(18)

No. 96-1578

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

THOMAS R. PHILLIPS, ET AL.,

Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF ATTORNEYS' BAR ASSOCIATION OF FLORIDA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Attorneys' Bar Association of Florida (ABAF) respectfully submits this brief *amicus curiae* in support of Respondents. Written consent to the filing of this brief has been granted by counsel for the parties, and letters of consent have been lodged with the Clerk.[1]

The Attorneys' Bar Association of Florida is a voluntary, statewide bar association created in 1992 by Florida lawyers dissatisfied with the increasing incursion of the mandatory membership Florida Bar into issues of social policy and politics. ABAF members include more than 500 Florida attorneys, many of whom opposed the adoption of a mandatory IOLTA program during a series of arguments before the Florida Supreme Court. Florida is the state where IOLTA had its genesis, following a series of decisions whereby mandatory taking of client interest on trust money held in lawyer trust accounts was gradually permitted. Accordingly, ABAF's perspective should complement the briefs of the parties and their *amici*, and assist the Court in the proper resolution of this case.

SUMMARY OF ARGUMENT

In a well-known work by surrealist M.C. Escher, the observer is confronted by an odd sort of triangle — the "impossible tribar" — which holds together as a drawing purely by means of incorrect connections. The three angles appear normal, but they have been joined together in a false, spatially impossible way. This curious phenomenon is not unlike the argument advanced by opposing *amici* in this case, who, while not disputing the general axiom that interest follows principal, nonetheless urge that Respondents can have no property interest

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[1] ABAF states that no counsel for a party authored this brief in whole or in part, and no person or entity other than ABAF made a monetary contribution to the preparation or submission of the brief. SUP. CT. R. 37.6.

in the yield of IOLTA accounts, even though Respondents' property was a necessary condition for the yield to occur. Like the Escher drawing, *amici*'s argument rests on false junctions, the principle one being that Respondents' property interest vanishes because the aggregate yield on pooled funds is a "government-created value." This argument fails for at least two reasons. First, it lacks a principled explanation for why the restructuring of Respondents' property rights *vis a vis* the State automatically occurs merely because the yield on Respondents' deposit has value in the aggregate, but not by itself. Second, the argument rests on a mistaken premise which, if taken as true, eviscerates the fundamental idea that property ownership includes as its most essential feature the right of exclusion. Because the "government-created value" argument is not logically or legally sound, it cannot be used as a rationale for denying that, indeed, interest earned on client trust funds in an IOLTA account is a property interest of the client or lawyer.

ARGUMENT

THE RULE THAT INTEREST IS AN INSEPARABLE INCIDENT OF PRINCIPAL CANNOT BE DEFEATED BY THE "GOVERNMENT-CREATED VALUE" ARGUMENT

In their brief on the merits, Respondents carefully explicate the venerable rule that interest follows principal, and demonstrate the rule's dispositive force in this case. ABAF will underscore Respondents' argument by addressing the contentions of several opposing *amici* who urge that the interest-follows-principal rule is inapplicable in these circumstances because of the structure of the IOLTA program.

In its *amicus* brief, the United States does not dispute as a general matter the validity of the interest-follows-principal rule. Nor does the United States question that the "client funds

underlying the IOLTA program are the property of respondents." Brief of United States at 10. Rather, it urges that in the circumstances of this case, the interest that would otherwise qualify as a cognizable incident of Respondents' property, lacks that attribute because the "interest generated through the IOLTA program is a government-created value." *Id.* at 9. We will refer to this as the "Created-Value" argument. The United States argues, in effect, that the sheer act of IOLTA's aggregation of the yield from principal severs the ownership connection between principal and interest that Respondents otherwise (unquestionably) possess. The American Bar Association's argument rests in large part on the same basic contention. The ABA asserts that Respondents have no cognizable property interest because "nothing is taken from clients and no opportunity to earn income is diverted." Brief of ABA at 12.[2] Neither of these arguments recognizes the fact that by virtue of individual client sub-accounts, it is now possible for every client to receive such interest as may accrue on the client's attorney trust account deposit. This was not the case when IOLTA was first proposed in the late 1970s and early 1980s. As shown below, however, the Created-Value argument is also invalid because *(1)* it lacks a principled basis, and *(2)* it rests on a faulty premise.

A. The Created-Value Argument Lacks A Principled Basis.

1. In Anglo-American jurisprudence, the basic precepts that govern analyses about property rights flow from the foundational work of Wesley Hohfeld's explication of rights and A.M. Honore's description of the incidents of ownership.

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[2] Similarly, the *amici* comprising various state bar organizations argue that Respondents cannot show a "legitimate claim of entitlement" as to IOLTA-earned interest, and thus can show no cognizable property interest. Brief of Amici Curiae at 14.

WESLEY N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 67 (Walter W. Cook ed., 1923); A.M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112 (A.G. Guest ed., 1961). Members of this Court have often assumed the validity of Hohfeld's schema in their own reasoning. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 452 (1989) (Kennedy, J., dissenting) ("I would prefer to follow the familiar Hohfeldian terminology"of correlatives); *U.S. v. Richardson*, 94 S.Ct. 2940, 2959 (1974) ("[R]espondent is in the position of a traditional Hohfeldian plaintiff"); *Zablocki v. Redhail*, 98 S.Ct. 673, 684 (1978) (Stewart, J., concurring in the judgment).

Under the conventional Hohfeldian analysis, any right *in rem* must be regarded as a myriad of personal rights between individuals. *See, e.g., Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141, 3162 (1987) (Brennan, J., dissenting) (Property is "more accurately described as being inextricably part of a network of relationships.") As one commentator has put it, "[M]y ownership of a car should not be regarded as a legal relationship between me and a thing, the car, but as a series of rights I hold against all others, each of whom has a correlative duty not to interfere with my ownership of the car, damaging it, stealing it, and so on." J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 U.C.L.A. L. REV. 711, 742 (1996). Property thus constitutes a complex of normative relations between the property-holder and others. This focus on the relational aspect of property assumes as axiomatic, that when the relations between a property-owner and others are restructured, there is a principled rule in play that justifies such action. In other words, the restructuring cannot occur in an arbitrary way without upsetting the reasonable, correlative expectations that hold the framework of property rights together. This is the point of the Court's phrase in *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158 (1922), that the analysis of property disputes as between an

individual and the State must ask whether "an average reciprocity of advantage" has been "secur[ed]." *Id.* at 162.

2. The Created-Value argument fails to incorporate this understanding of the nature of property rights. Applying the relational model to this case makes clear that the State's acquiring ownership of Respondents' property, simply by virtue of the extra value the IOLTA program creates, is incoherent. Nothing in the Created-Value argument explains *why* that restructuring of the respective rights and duties of the parties automatically occurs *merely because* the yield on Respondents' deposit has value in the aggregate. There is no logical principle that explains the basis for the restructuring of the relationship — the fact that, in any normal circumstances the incidents of Respondents' property are preserved, whereas here they are stripped.

The point can be illustrated this way. Suppose the property in question were a tiny piece of farmland. Although the land is so small that the food crop it yields is not worth the cost of planting, the landowner plants potatoes for his own pleasure. The State decides, however, that the aggregation of such yields from a large number of similar landowners could be used for purposes the State deems to be in the public interest. The State argues that since the aggregation of the yields is a "government-created value" — *i.e.*, individual yields do not become usefully large until they are aggregated — then the yield for any individual crop cannot any longer be said to be a property interest of the landowner. In other words, the value created by the aggregation of the yields somehow *transforms* what in any other setting would be an indisputable property interest of the landowner, into an interest of the State.

By what principle of property rights or law could that transfer of interests possibly be said to occur? In the instant case,

what can account for Respondents' loss of the State's correlative duty not to interfere with their claim of beneficial use? On this score, the imagery of the Fifth Circuit's opinion below is particularly apt.

> It has been suggested that the IOLTA program represents a successful, modern-day attempt at alchemy. While legends abound concerning the ancient, self-professed alchemists who worked tirelessly towards their goal of changing ordinary metal into precious gold, modern society generally scoffs at such attempts to create "something from nothing." The defendants in this case denounce such skepticism, declaring that they have unlocked the magic that eluded the alchemists. . . . The defendants then contend that Texas used the IOLTA program to stake a legitimate claim to these funds and that the plaintiffs cannot now seek to repossess the fruits of the magic as their own. We, however, view the IOLTA interest proceeds not as the fruit of alchemy, but as the fruit of the clients' principal deposits.

Washington Legal Foundation v. Texas Equal Access to Justice Foundation, 94 F.3d 996, 1000 (5th Cir. 1996). *Amici* do, in fact, offer a candidate for the missing explanatory principle. Relying on the Court's analysis in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), the United States asserts that Respondents are unable to show that the IOLTA program "deprives them of 'interests that were sufficiently bound up with the reasonable expectations of [respondents] to constitute "property" for Fifth Amendment purposes.'" Brief of the United States at 13.[3]

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[3] *Pennsylvania Coal Co. v. Mahon*, 43 S.Ct. 158 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed

However, *Penn Central*'s concept of reasonable "investment-backed" expectations is plainly inapposite in this context. In that case, owners of a city railroad terminal which was designated a historic landmark, could not establish a "taking" simply by showing that they had been denied the ability to exploit the superadjacent air space, irrespective of the remainder of the parcel. The concept of "investment-backed" expectations thus refers to cases where it cannot fairly be said that the disputed use of the property would have been envisaged, or a reasonable expectancy as to a particular gain have been in play, when the property owner decided to acquire the property in the first place.

But it cannot seriously be argued that interest accruing on principal — one of the most fundamental and salient dynamics in force whenever funds are deposited — was not "sufficiently bound up" with Respondents' expectations concerning the possible uses of the funds involved here. Interest as an incident of principal is surely one of the most foreseeable dimensions of modern commercial relations. Indeed, for that reason the instant case seems the very counterfactual to fact patterns such as *Penn Central*, *supra*, where the property owner's expectations were held to be too attenuated. *See also, e.g., United States v. Willow River Power Co.*, 65 S.Ct. 761 (1945) (interest in high-water level of river for runoff of tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power*

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expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal underneath. A Pennsylvania statute, enacted after the transactions, prohibited any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, the Court held that the statute was invalid as effecting a "taking" without just compensation.

Co., 33 S.Ct. 667 (1913) (no property interest can exist in navigable waters).

If *amici*'s "reasonable expectations" argument were grounded in the fact that Respondents' interest in the yield is of relatively minor size, or that their deposit by itself may create only nominal value, *see* Brief of the United States at 23-24, that too would be an error. The extent of Respondents' property interest is not a function of the value the principal can produce. As demonstrated in Section B, *infra*, that criterion is irrelevant to the existence of Respondents' property rights, as this Court determined in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund is property").

Nor can *amici* persuasively urge that, because the deposit of the funds in the IOLTA account was mandated by law,[4] then Respondents' property interest could have included no aspect of "reasonable expectations." This reasoning fails in at least two respects. First, the conclusion begs the question. *Amici*'s "reasonable expectations" principle is the critical link in the Created-Value argument. The fact that the IOLTA program legally compelled the funds to be deposited cannot therefore be offered as the justification to sever principal from interest. That would be a tautology: *Amici* would in effect be saying to Respondents, "You retain no property interest in the IOLTA yield because the IOLTA program takes it away from you." A principled basis for "taking it away from you" — for the deprivation of that interest — is precisely what *amici* must offer in support of the IOLTA program, but they cannot.

[4] In Florida, IOLTA accounts are mandated by state court rule.

Moreover, as a matter of the formal structure of their argument, *amici* cannot press *both* the claim that mandatory IOLTA proves the absence of "reasonable expectations" *and* the claim that Respondents' exclusionary rights were "voluntarily relinquished" when the funds were deposited with the attorney. *See, e.g.*, Brief of ABA at 13-14. Those positions are logically inconsistent, causing the Value-Created argument to collapse on itself.

In short, without a principled basis for demonstrating why the general rule that interest is an incident of principal is defeated by the Value-Created argument, the claim that Respondents' property interest does not extend to the IOLTA-created yield, must fail.

B. The Created-Value Argument Rests On A Faulty Premise.

1. The Created-Value argument is invalid for another reason. To see this, consider the argument's critical premise — namely, that if the aggregate yield on principal is not something attributable to the property-owner's purposive *use* of the principal, then it cannot be said that the yield qualifies as a property interest in which the owner retains any rights. *Amici* claim that Respondents' rights must have pretermitted because the process by which the IOLTA-generated yield occurs is one in which Respondents are not involved and cannot control. Hence, the argument concludes, since "nothing is taken from clients," Brief of ABA at 12, the regulatory scheme underlying IOLTA programs cannot, by definition, pose a takings problem.

This premise is erroneous because it mistakenly equates the inability to control or create the process by which the interest is generated, with Respondents' ultimate right to the beneficial use of the property. To see the difference, one can think of

Respondents' funds as a necessary, but not sufficient condition, for the creation of the yield. Respondents' property alone did not produce the yield, but it was plainly a contributing cause in that process, without which the yield would not have materialized. Looked at in this way, it is clear that nothing about the process bore on Respondents' underlying property rights.

This point is crucial because the faulty premise created by *amici*'s conflation of these notions explains their apparent belief that Respondents' right to exclusive use of the property has disappeared or been trumped by the State. To the contrary, the use of an individual's property, whether in an IOLTA program or a different context, cannot affect the property-owner's right of exclusion. The accretion of interest resulting from funds placed in IOLTA accounts is simply a consequence of a particular use of that property. As shown above, the fact that any single individual's principal does not by itself create the yield has no bearing, analytically, on the nature of the property rights in play, including the right of exclusive use.

Over the years, this Court repeatedly has invoked the principle that the right to exclude others from the use of one's property is one of the defining attributes in the "bundle" of property rights. For example, in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), the Court predicated its analysis on the petitioner's "loss of her ability to exclude others" and described the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 2316 (citation omitted). *See also, Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164, 3176 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"); *Nollan v. California Coastal Com'n*, 107 S.Ct. 3141, 3145 (1987) ("We have repeatedly held" that the right to exclude others is an essential attribute of property

ownership"); *United States v. General Motors Corp.*, 65 S.Ct. 357 (1945) (The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's ownership").

In addition, scholarly commentary is remarkably unanimous in endorsing the validity of the exclusive use principle. *See, e.g.*, A.M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107-47 (A.G. Guest ed., 1961); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 35-104 (1985); LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 11-21 (1977); BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 232 (1977); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 U.C.L.A. L. REV. 711, 742 (1996) ("The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved by others excluding themselves from it"); Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (1972) (Ownership entails the right of exclusion; "others may use the property if and only if the owner consents").

In short, because a critical premise of *amici*'s argument conflicts with the well-established right to exclude others from the use of one's property, their argument is unavailing.

2. It is important to recognize a vital corollary to what has so far been said. Because the processes affecting the uses of property do not affect ownership rights in it, one's capacity to retain decisionmaking authority as to the disposition of the property remains firmly in place. This is a helpful way to think about Respondents' exclusionary rights as an essential attribute of their general property rights in this case. While this view may seem intuitively obvious, it is a useful vehicle for illustrating in the most concrete way precisely *why* the existence of mandatory

IOLTA should not be allowed to trump the otherwise indisputable connection between principal and interest.

Specifically, with this model in mind it is easy to imagine any number of circumstances where an individual may *object* — in a fully warranted way — to the use of his property to support various legal programs supported by IOLTA-generated revenues. The most clear-cut cases, of course, are those in which the person is ideologically opposed to litigation positions that may be advocated by attorneys who are paid with IOLTA funds, in whole or in part, for the representation of their clients. These attorneys need not even be dealing with the sorts of issues, such as abortion rights, that are the most politically divisive. For instance, a person may be concerned that his position on such matters as immigration policy, parental rights, prisoner rights, welfare reform, drug enforcement laws, and other legal issues are typically at odds with positions regularly taken by advocacy organizations, including legal services providers, who are funded by IOLTA.

In addition to these categories of cases involving philosophical or political differences, are the variety of situations where an individual recognizes that his own economic or legal interests are compromised by the litigation efforts of legal services attorneys; for example, when a landlord attempts to evict non-paying tenants represented by an IOLTA-funded legal services agency, and thus sees his own property — the retainer fee deposit — as contributing to the legal advocacy of the very tenants he is trying to evict.[5]

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[5] Indeed, in Florida IOLTA monies can, and presumably have, been used to fund death penalty appeals, creating the gravely troubling prospect that the interest earned on the trust deposit money of victims' families has paid to defend the person convicted of murdering their loved one.

In these cases, the principle that a person holds exclusionary rights with respect to his property has particular force if viewed in terms of the owner's capacity for exclusive decisionmaking. An unauthorized use of the property that conflicts with his decision as to how he desires the property to be used, is a clear infringement. In our case, the State has usurped Respondents' rights in precisely this manner, and *amici*'s Created-Value argument offers no way out of that problem.

CONCLUSION

For these reasons, the judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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